orders under section 352 must bear the indorsement before they can be enforced.

I would therefore allow the appeal and discharge the order of the 21st October, 1932.

Appeal allowed.

Solicitors for Plaintiff (Respondent)—
Braddell Bros.

Solicitors for Defendant (Appellant)—
Johannes and Sammy.

[ORIGINAL CIVIL JURISDICTION]

WHITLEY, J.

October 22, 1934.

IN *RE* THE WILL OF CHEAH SEONG GEOK—deceased.

[PENANG ORIGINATING SUMMONS No. 87 of 1934]

Will—Construction—Sole executor and trustee—Direction to divide trust estate at trustee's discretion amongst definite objects—Death of trustee before exercise of discretion—Validity of bequest—Destination of property bequeathed.

A testator devised and bequeathed to the sole executor and trustee of his will "all and singular my real and personal Estate whatsoever and wheresoever in the world upon trust (together with such portion thereof as shall be at the time of my decease) to get in, sell and convert and realise the same and upon such being done to divide, apportion, make over and deliver all the proceeds thereof in the usual manner or custom of the Chinese between and to himself his mother (my wife) and three brothers in such proportions usually adopted in such and similar cases and also with full power to my said Executor to hold detain or otherwise keep the said portions as to him shall seem most expedient or devisable to the benefit of the person receiving the same or his own benefit. The sole executor and trustee died without having exercised the discretion vested in him.

Held, that the bequest was not void for uncertainty

Held also, that the Executor had no right to keep the property for his own benefit and

Held also, that the property the subject of the bequest which remained unadministered should be divided equally amongst the ascertained objects thereof, namely, the testator's widow and his sons mentioned in the will.

Adjourned Originating Summons for construction of the will of the said Cheah Seong Geok deceased.

The testator died on the fourth of March 1910 after having made his will dated the 9th of March 1882, whereby he appointed Cheah Choon Seng to be the sole executor and trustee thereof. Probate of the testator's said will was on the 17th of July 1911 proved by Cheah Choon Seng before the Supreme Court at Singapore.

Cheah Choon Seng died on the 4th of February 1916 without having fully administered the estate and effects of the testator. By his last will made on the 31st of March 1912 Cheah Choon Seng appointed Cheah Hee Nyan the sole executor and trustee thereof.

Probate of the will of Cheah Choon Seng was granted to Cheah Hee Nyan on the 8th November 1916 by the Supreme Court at Penang.

Cheah Hee Nyan by deed dated the 23rd of December 1921 appointed Cheah Lean Guan trustee of Cheah Choon Seng's will jointly with himself. By deed dated the 11th of December 1922 Cheah Hee Nyan retired from the trusteeship leaving the said Cheah Lean Guan the sole trustee thereof.

The material provisions of the testator's will are set out in the headnote and also in the Judgment.

Cheah Seong Geok died leaving surviving him one son and five daughters, namely, Cheah Choon Seng (son), Cheah Kooi Keow, Cheah Mee Keow, Cheah Chow Lean, Cheah Foong Keow and Cheah Chien Keow (daughters).

The questions raised on the Originating Summons were:—

(1) Whether on the true construction of the Will of the said Cheah Seong Geok (deceased) and in the events that have happened Cheah Choon Seng is entitled to the whole of the remaining properties of the said Cheah Seong Geok (deceased) or only to a portion thereof

(2) If the said Cheah Choon Seng is entitled only to a portion, who are the other persons entitled and in what proportions.

Ong Huck Lim for the applicant, Cheah Lean Guan.

Ross for the estate of Cheah Choon Seng deceased.

Conaghan for Cheah Chow Lean.

Cur. Ad. Vult.

WHITLEY, J.—This Summons was taken out by Cheah Lean Guan as Trustee of the Will of Cheah Choon Seng deceased, and raises a question of construction of the Will of Cheah Seong Geok deceased who was the father of Cheah Choon Seng.

By this Will dated the 9th March 1882, Cheah Seong Geok appointed Cheah Choon Seng to be his sole Executor and Trustee. Cheah Choon Seng died in 1916 without having fully administered the Estate and by his Will he appointed

Cheah Hee Nyan his sole Executor and Trustee. The latter in pursuance of his powers appointed Cheah Lean Guan to be joint Trustee with him and later retired from the trusteeship leaving Cheah Lean Guan sole Trustee.

Certain property of Cheah Seong Geok in Penang remains unadministered and the Trustee seeks the directions of the Court as to what persons are entitled under the terms of the Will. Certain representation orders were made as the result of which all parties who might be entitled were brought before the Court.

The material part of the Will which is a combined Will and Power of Attorney reads as follows:—

> "I declare that he the said Cheah Choon Seng is hereby appointed my Executor solely and I devise and bequeath to him all and Singular my real and personal Estate whatsoever and wheresoever in the world upon trust (together with such portion thereof as shall be at the time of my decease) to get in, sell and convert and realise the same and upon such being done to divide, apportion, make over and deliver all the proceeds thereof in the usual manner or custom of the Chinese between and to himself his mother (my wife) and three brothers in such proportions usually adopted in such and similar cases and also with full power to my said Executor to hold detain or otherwise keep the said portions as to him shall seem most expedient or devisable to the benefit of the person receiving the same or of his own benefit."

It was argued by Mr. Conaghan on behalf of the next of kin that the bequest is void for uncertainty; that there is a resulting trust to the Testator and that the next of kin are entitled. Mr. Ross, for the Estate of Cheah Choon Seng, deceased, contended that the Will gave the Executor an absolute unfettered discretion, including an option to keep the property for his own benefit, and that as he did not divide or apportion he must be taken to have exercised that option by keeping the property himself. Mr. Huck Lim for the Trustee resisted both these contentions and submitted that the intention of the Testator is sufficiently clear and that the Estate of Cheah Choon Seng cannot be entitled to retain the whole of the property.

I take the same view as the Trustee. Allowance must be made for the fact that this is apparently a 'home made' will in which one cannot expect to find the careful wording of a document drawn up by a lawyer. The wording is certainly curious but the Court always leans against an intestacy and I think this is a case in which it is possible to ascertain and give effect to the intentions of the Testator without straining the meaning of the words used. He makes it quite clear that he trusted his Executor completely and left him a very wide discretion. He designates the objects of his bequest clearly. They are to be his widow and his sons including the Executor, and it is left to the Executor to decide the proportion which each is to have and when each share is to be distributed. So far the Will presents no difficulty but the Testator then proceeds to direct that the Executor is to divide his property between these five beneficiaries 'in the usual manner or custom of the Chinese in such and similar cases.' What exactly does that mean? No evidence as to Chinese custom was called but I was referred to two well known authorities—*Guy Boulais'* Manuel du Code Chinois and *Jamieson's* Chinese Family and Commercial Law from which it would appear that ordinarily in China the widow would take no share but have a right to maintenance and that sons would generally share equally though the eldest in some cases take a double share.

It was suggested on the one hand that there might be a reference to the Registrar under section 1011 of the Civil Procedure Code to record evidence with a view to determining to what custom the Testator referred. Mr. Conaghan on the other hand submitted that as the Testator clearly intended the widow to share whereas according to Chinese custom she would not ordinarily take any share, it is impossible to ascertain the shares and the bequest must be void for uncertainty. He relied upon the cases of *Asten* v. *Asten* (1894) 3 Ch. 260 and *Lubber* v. *Lubber* 47 Revised Reports 291 but the facts in those cases differ so widely from those now under consideration that I do not think that the rules laid down in them can be properly applied here.

The view which I take is that this is one of those cases where a power of selection or distribution among a number of objects gives rise to an implied gift in their favour and if the power is not exercised the Court divides the property among them equally. The objects designated were the widow and the sons. The Executor was given a power of distribution among those objects to be exercised in accordance with a custom which was no doubt as familiar to the Executor as to the Testator—probably the custom of that part of China from which the Testator's family came. The Executor died without exercising that power of distribution and the situation which has arisen would appear to bring the case within the rule

laid down in the case of *Brown* v. *Higgs*, 4 Vesey Jun. 707. In that case the Testator bequeathed an estate to A upon trust to pay the rents to 'such children of B as A shall think most deserving or to the children of C if any such there shall be.' A died while the Testator was alive. In the course of his judgment Grant, M.R. stated the principle to be gathered from the cases as follows (8 Vesey Junr. at page 573):—

> "If the power is a power, which it is the duty of the party to execute, made his duty by the requisition of the Will, put upon him as such by the testator, who has given him an interest extensive enough to enable him to discharge it, he is a trustee for the exercise of the power, and not as having a discretion, whether he will exercise it, or not; and the Court adopts the principle as to trusts; and will not permit his negligence, accident, or other circumstances, to disappoint the interests of those, for whose benefit he is called upon to execute it."

The decree declared that in the events which had happened the rents were bequeathed in trust for all the children of A and the children of C if any. This decree was affirmed on appeal to the House of Lords.

In *Longmore* v. *Broom*, 7 Vesey Jun. 124 there was a bequest to executors to pay the proceeds to the testator's two brothers and his sister or their children in such shares and at such times as the trustees shall think proper. The trustees not having exercised their discretion the Master of the Rolls (at page 128) observed as follows:—

> "The executors then having their discretion might say to whom the fund should be given, the parents or the children. But the Court has not that discretion; but has only to say what class is to take and then the distribution must be equal.....The trustee had a discretion and might have excluded some; but this Court having once ascertained that those were the objects of bounty, was obliged to divide it among all. So in this instance the Court must give the fund equally between the parents and the children; but the executors themselves were not so restrained."

Those were old cases decided in 1799 and 1802 respectively but the same principle was re-affirmed very clearly by Cotton, L.J. in the case of *In re Douglas, Obert* v. *Barrow*, L.R. 35 Ch. D. 485. He observes:—

> "Take a gift to A., B., C., or any number of individuals or institutions in such proportions as a trustee or anyone else shall name and appoint; if the person designated does not exercise the discretion and power given, then the Court will execute the trust. It will do so, where the objects are definite, by deciding, unless there is something in the will to show a contrary intention, that the fund which is the subject of the trust shall be divided equally amongst all the objects of the testator's bounty. The trustee to whom a discretion is given might have given it unequally—he might have excluded some if he thought fit; but where the Court, not having the discretion which is given to the trustee, has to administer the trust, in the absence of anything special in the instrument, it administers the trust by dividing the fund equally amongst the named and definite objects."

These cases, in my opinion, afford direct authority for holding in the present case that, the objects being definite, and the person designated not having exercised the discretion given, the property which is the subject of the bequest and not yet administered must be divided equally amongst all those objects namely the widow and the sons named. I hold accordingly.

Costs of all parties to be taxed as between Solicitor and Client and paid out of the Estate.

Order accordingly.

Solicitors for the applicant—*Huck Lim & Hock Soo.*

Solicitors for the Estate of Cheah Choon Seng deceased—*Logan Ross & Samuel.*

Solicitors for Cheah Chow Lean—*Wreford & Thornton.*

THE END OF STRAITS SETTLEMENTS OFFICIAL REPORTS.